Appeal No. UKEAT/0525/12/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 23 April 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MRS C BAELZ

MS G MILLS CBE

CONTRACT BOTTLING LTD — APPELLANT

(1) MISS L CAVE
(2) MISS W A McNAUGHTON — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS PHILIPPA JACKSON (of Counsel) Instructed by: Richard C Hall & Partners Red Hill House Hope Street Saltney Chester CH4 8BU
For the Respondents	MR DAVID ROBINSON-YOUNG (of Counsel) Instructed by: Messrs Askews Solicitors 4-6 West Terrace Redcar Cleveland TS10 3BX

SUMMARY

REDUNDANCY – Exclusion

UNFAIR DISMISSAL

Reasons for dismissal including substantial other reason

Polkey deduction

For economic reasons the employer needed to make cuts in administration and accounts staff. It lumped together in one pool employees of more than one kind and applied a generic scoring matrix, expressing a willingness to retrain those who scored well in the matrix. The Employment Tribunal was not satisfied that the employer had proved that the dismissal of the Claimants was for redundancy. **Held**: applying the two-stage **Murray v Foyle Meats** test, the ET should have found that the reason was redundancy. There was a diminution in the employer's requirements for employees to carry out particular kinds of work; the dismissals were attributable to that diminution; the disparate and unsatisfactory nature of the pool did not affect that conclusion.

The ET had however, made in the alternative compelling findings as to why the dismissal, even if for redundancy, was unfair. Appeal concerning unfair dismissal dismissed.

The ET said that there was "no evidence" on which to make a **Polkey** deduction. There was evidence – including the established need to make cuts, the reduction in the workforce and some evidence specific to the accounts staff. Remitted to the Tribunal to consider the evidence and give reasons. **Software 2000 v Andrews** applied.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Contract Bottling Limited ("CBL") against a Judgment of the Employment Tribunal, Employment Judge Hesselberth presiding, dated 8 February 2012. By its Judgment the Employment Tribunal upheld claims of unfair dismissal by a Miss Leanne Cave and Miss Wendy McNaughton. It was CBL's case before the Tribunal that Miss Cave and Miss McNaughton were dismissed on grounds of redundancy. The Tribunal did not accept this. CBL appeals, holding that the Tribunal ought to have found that the reason for dismissal was redundancy or at the very least some other substantial reason. This is the first issue on appeal.

2. The Tribunal went on to say that even if the reason was redundancy the dismissal was substantively unfair. The Tribunal dealt with an argument that any compensation for redundancy should be reduced on **Polkey v A E Dayton Services Ltd** [1988] 1 AC 344 grounds. It declined to reduce compensation. CBL appeals, arguing that the Employment Tribunal has not sufficiently dealt with the evidence in its reasons. This is the second issue on appeal.

The background facts

3. CBL manufactures and bottles soft drinks. It fell into financial difficulties and was rescued by Mr Martin Thornton, who became the sole shareholder. Mr Thornton found that he needed to take drastic measures to reduce the overheads of the company, in particular staffing costs. Cuts were required in administrative staff. Two initial resignations took place, leaving ten administrative staff. These included Miss Cave and Miss McNaughton, who were, respectively, accounts manager and accounts administration supervisor. There were eight

others whose functions were described by the Tribunal as follows: sales ledger, sales department (two employees); production and stock control (two employees); quality control; account engineer; and warehouse manager.

4. We now come to what was an unusual feature of this case. CBL decided to put all these employees with their different functions into a single pool and to employ a matrix comparing all of them on generic grounds, with the intention of dismissing four staff and keeping the others whatever their function had been, retraining them as necessary. Mr Thornton had brought in Mr Peter Sutcliffe, a consultant with human-resources experience, to help him. In his witness statement he described the decision as follows (paragraph 4):

> **"Martin then went on to discuss the Management & Administration team and believed the cost of running this team to be excessive, he had already gone about improving efficiency as he planned to implement the accounting package Sage but we also agreed that the need for the amount of employees [sic] within this function had reduced due to the changing nature of customers and workload. We agreed that the team should be reduced by six persons and that we should look to include everyone in the process and then redistribute the tasks among the remaining members, offering training where appropriate."**

5. The Tribunal commented that the persons concerned were people with "a divergence of skills or totally incomparable skills". Later, it said that the pool contained people with "far ranging and unrelated skills". Taken at face value, what Mr Sutcliffe was saying was that staff might be retrained to do work of a completely different kind to their own; for example, a warehouse manager retrained to do accounting work.

6. This seemed surprising, but Mr Thornton confirmed it in evidence. He said that if the person in quality control came bottom of the scores in the matrix, he would have been dismissed, even though the quality-control function was still required, and the function would

be reassigned to someone else in the organisation or a new person recruited. The Tribunal expressly said it attached importance to this evidence when it decided the reason for dismissal.

7. The Employment Tribunal criticised the way in which CBL selected the employees to be made redundant in a number of respects. Its criticisms are compelling. They include the following:

(1) CBL ignored the redundancy matrix provided for in the employee handbook, which contained objective elements.

(2) CBL instead adopted a redundancy matrix that was entirely subjective in character.

(3) CBL caused the marking to be done by a person who had little to do with the team he was marking and was therefore "wholly inappropriate" for the task and unable to explain the marking.

(4) CBL's Mr Thornton also had an input into the marking, even though he had no relevant experience of the employees at all.

(5) CBL declined or were unable to give to Miss Cave and Miss McNaughton any explanation of their scores.

(6) CBL did not engage in any meaningful consultation.

(7) Mr Thornton involved in the marking of scores and in the decision to dismiss but still conducted the appeal hearings.

8. Miss Cave and Miss McNaughton were dismissed with notice. Appeals were rejected by letter dated 2 June 2011.

9. It is relevant before we turn to the Tribunal's reasons to mention one further aspect of the evidence of Mr Thornton, which is relevant to CBL's argument on the **Polkey** issue. He said in his witness statement (paragraph 11):

> **"The work of a particular kind that had been identified as no longer required was that of accounts and administrative functions. Two from three of the Accounts team were dismissed on the grounds of redundancy. Part of the reason for the reduced requirement of that particular kind of work was that I was installing a Sage Accountancy package in March 2011 that would in effect produce more cost effective, quicker and accurate key management and financial information."**

10. Later, he said (paragraph 33):

> **"I can categorically state that in the event the tribunal do not believe I followed a fair procedure during the course of handling these redundancies, I do not expect that if the correct procedure had been followed that [sic] the outcome would be different. The simple fact of the matter is that the roles and duties performed by Ms Cave and Ms McNaughton are now carried out by an IT software package, Sage Accounts, and the parts that aren't I or Keith now manage."**

The Tribunal's reasons

11. On the question of the reason for dismissal the Tribunal set out the definition of redundancy contained in section 139 of the **Employment Rights Act 1996** (ERA). It also set out section 98(1) and (2) of the 1996 Act. It then continued:

> **"51. The tribunal having carefully considered s.139 and the factual issues in this case finds that the respondent had a need to make various cuts and that it was top heavy in terms of the number of staff in the business. It accepts the respondent's contention that the office based staff overall were significantly overmanned. However the process carried out by the respondent was to put into a pool employees from different disciplines within the organisation which we have already identified but ranged from warehousing, quality control, sales and administration embracing the accounts functions of the two claimants. The respondent's objective was to cut the numbers irrespective of their respective skills and areas of operation. What the respondent did not do was to identify the employees who carried out work of a particular kind nor that that particular kind of work had ceased or diminished or was expected to cease or diminish. This could be termed a scatter gun approach and for this reason the tribunal finds that the facts of this case do not give rise to a finding that either of the claimants who were dismissed should be taken to be dismissed by reason of redundancy. The focus was on reducing the wage bill not identifying specifically the requirements of the business and in which areas, if at all, the work of a particular kind had ceased or diminished.**
>
> **52. This finding is unequivocally borne out by the evidence of Mr Thornton when he made it clear that it did not matter who went so long as the wage bill was reduced and he gave the example of the quality manager. It is worth repeating what we have already said in these reasons about the quality manager who was necessary for the business. In short had the quality manager (whose work apparently had not diminished) been selected under the matrix**

used then that responsibility would have had to have been allocated to an alternative employee within the business or indeed someone recruited from outside."

12. The Tribunal did not consider the alternative: that dismissal might be for "some other substantial reason". The Tribunal set out its reasons for concluding that the selection process was substantively unfair and that there was no meaningful consultation or consideration of alternatives to dismissal. We have summarised this reasoning already.

13. On the **Polkey** question the Tribunal said (paragraph 57):

"We have considered whether or not there are any factors in this case which would give rise to consideration as to whether or not had there been a fair procedure that the dismissals would have taken placed [sic] in any event or any factors which would support a reduction in the compensation which will be due to the claimants. The tribunal finds that there is no evidence to suggest that had there been a fair and proper process that [sic] there was a percentage chance that either of these claimants would still have been dismissed."

Statutory provisions

14. The key statutory provision is section 139(1) of the ERA 1996, which defines redundancy in the following way:

"For the purposes of this Act an employee who is dismissed should be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

Have ceased or diminished or are expected to cease or diminish."

15. This being an unfair dismissal case, the Employment Tribunal applied section 98 of the ERA. Section 98(1) provides that it is for the employer to establish the principal reason for dismissal and that it is of a kind specified in section 98(2) or some other substantial reason. Section 98(2) specifies redundancy. Section 98(4) provides that where the employer has fulfilled the requirements of section 98(1):

> **"The determination of the question whether the dismissal is fair or unfair, having regard to the reasons shown by the employer—**
>
> **(a) depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

16. The **Polkey** question arises by virtue of section 123(1) of the 1996 Act, which directs a Tribunal to award such compensation as is just and equitable.

Reason for dismissal

17. Ms Philippa Jackson, who appears on behalf of CBL, makes in essence three submissions. Firstly, she submits that the Employment Tribunal erred in law by failing to apply the two-stage test derived from section 139 and set out in **Murray v Foyle Meats Ltd** [1999] IRLR 562. She submits that the Tribunal has been deflected from a consideration of this test by looking at the pool that CBL selected. If the Employment Tribunal had applied the two-stage test, it would have found that the Claimants were redundant. Secondly, in the alternative, she submits that the Employment Tribunal erred in law by failing to ask whether there was "some other substantial reason for dismissal", a question that it had identified for itself in setting out the issues for its consideration. Thirdly, she submits that the Employment Tribunal's failure to find the reason for dismissal infects the balance of its reasoning on the question of fairness.

This submission she made more faintly, recognising the strength of the Employment Tribunal's findings on the question of fairness.

18. Mr Robinson-Young, who appears on behalf of Miss Cave and Miss McNaughton, places emphasis on the words "particular kind" in the definition within section 139. He submits that there was no real evidence to show that there was a diminution in the requirements of the business for employees to carry out work of a particular kind. He says that no alternative case of "some other substantial reason" was pleaded, and he says in any event that the reasons for holding the dismissal to be unfair were compelling.

19. We agree with Ms Jackson's first submission. In **Murray** the House of Lords emphasised the importance of following the statutory wording carefully. Lord Irvine said that two questions had to be addressed:

> **"The first is whether one or other of the various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation."**

20. Applying the two-stage test laid down in **Murray**, the first question for the Tribunal was whether there was a diminution in the requirements of the business for employees to carry out work of a particular kind. As a general rule, employers who are considering redundancies tend to look individually at the different kinds of work they have within the business: it is then easy to see that there is a diminution in the requirement of the business for employees to carry out work of a particular kind. But it no doubt sometimes occurs that there is a diminution in the requirements of the business for employees to carry out work of several kinds. Such a state of affairs is capable of satisfying the first stage in the **Murray** approach.

21. In this case, there can be no real doubt that there was a diminution in the requirements of the business for employees to carry out work of particular kinds. The administration department was, on the Tribunal's findings, overmanned. The Tribunal was concerned that the employer did not identify for the purposes of the pool which particular kinds of work were overmanned, but we do not think that matters, so long as the state of affairs was proved to exist.

22. The second question is whether the dismissals were attributable to the state of affairs in question; that is to say, the diminution in the requirement or requirements of the business for employees to carry out work of a particular kind of kinds. In our judgment, it is plain that they were. We think it is instructive to consider the example of the quality manager, as the Employment Tribunal itself did. It is true that if he was the person selected for dismissal under CBL's rather surprising pool, he would be an example of "bumping", but his dismissal would nevertheless be attributable to a diminution in the requirements of the business for employees to carry out work of a particular kind or particular kinds. He would be entitled to a redundancy payment. It is, we think, important to keep in mind that although the redundancy question presented itself to the Tribunal in the context of an unfair dismissal case, redundancy is fundamentally concerned with the grant of rights to an employee, in particular a redundancy payment, under Part XI of the 1996 Act.

23. Thus far we are with Ms Jackson. In our judgment, the Tribunal ought to have found that the reason for dismissal was redundancy. We therefore do not need to address her alternative submission that the dismissal was for some other substantial reason.

24. At this point, however, we part company with her submissions. We do not think the Tribunal's mistaken approach to the reason for dismissal in any way vitiates the balance of its

conclusions. The Tribunal went on to set out reasons why the dismissal was unfair that were applicable if the reason for dismissal was redundancy. The Tribunal was surprised about CBL's choice of pool, but its criticism of CBL's dismissals assumes that CBL was entitled to choose the pool that it chose. The Tribunal's criticisms of CBL's dismissals are compelling; we see no answer to them. It follows that the finding of unfair dismissal in each case will be upheld.

Polkey

25. Ms Jackson criticises the Employment Tribunal's conclusion that there was "no evidence" that either Miss Cave or Miss McNaughton would have been dismissed if a fair procedure had been followed. She submits that there was evidence that the Employment Tribunal was required to consider and evaluate. She relies on the undoubted fact that there was a need to reduce manpower in a relatively small department of the workforce, that actual redundancies were made and that there was an established need to make redundancies in the accounting function because of the introduction of a computer package. She refers to and relies on the principles in **Software 2000 Ltd v Andrews** [2007] IRLR 568 and in particular on its application in **Eversheds Legal Services Ltd v De Belin** [2011] IRLR 448. She accepts that her challenge is essentially to the sufficiency of the Employment Tribunal's reasoning on this point.

26. Mr Robinson-Young submits that the procedure followed by the Respondent was not flawed and unsatisfactory that there was indeed no basis upon which any **Polkey** reduction could properly have been made.

27. On this point we prefer the submissions of Ms Jackson. We think that the Employment Tribunal's reasoning is insufficient to deal with the issue. The starting point in applying the **Polkey** principle is indeed **Andrews**. It is sufficient to set out four principles contained in the Judgment of Elias P:

> **"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.**
>
> **(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)**
>
> **(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.**
>
> **(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence."**

28. **De Belin** was an application of these principles. The Tribunal had said that there was "insufficient evidence" to enable it to carry out a **Polkey** exercise. The Employment Appeal Tribunal pointed out the evidence that existed and continued:

> **"We do not understand on what basis that evidence can be said to be 'insufficient', in the sense of not requiring the Tribunal to consider it at all. It might be unconvincing, or flawed; but if so it was the duty of the Tribunal, as part of its obligation to give reasons, to engage with the evidence and explain why it did not accept it, rather than dismissing it *in limine*."**

29. Applying this approach, there was, in our judgment, evidence upon which a **Polkey** reduction might have been made. There was an established need to reduce manpower among a relatively small workforce. Redundancies were actually made. There was evidence about the introduction of a computer package that would require a reduction in staff in the accounting

department. It was, in our judgment, not sufficient for the Tribunal to say that there was "no evidence" which could justify a reduction. It was required to grapple with the evidence there was and give reasons for its decision. If the Tribunal felt that despite the evidence of overmanning and redundancies the position was so speculative that no award should be made (see the third principle in **Andrews**), it was required to explain in its reasons why this was. If on the other hand there was some evidence, the mere fact that there was an element of speculation was not a reason for refusing to have regard to it.

Disposal

30. It follows that on this question there must be a remission to the Tribunal. We have carefully considered the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. In our judgment, applying those principles, the just and convenient course is to remit the matter to the same Tribunal. As presently advised, we do not see the need for any fresh evidence to be heard. The Tribunal will have its notes from the last hearing and copies of witness statements. The Tribunal should listen to submissions that concentrate on the **Polkey** issue in a way that no doubt they would not have done at the previous hearing. The Tribunal should consider afresh whether there are grounds for making a **Polkey** reduction. If it considers that there are no grounds for making a **Polkey** reduction, it should explain carefully in its reasons why this is. If it considers that some **Polkey** reduction should be made, and how much, it should also give reasons for those conclusions.

31. In summary, therefore, the appeal against the finding of unfair dismissal will be dismissed; the appeal in relation to the question of **Polkey** will be allowed. The matter will be remitted to the same Tribunal for the Tribunal to reconsider in accordance with this judgment.